November 28, 1973

To Our Clients

Recent Developments

1. Foreign Ownership of U.S. Corporations. A bill, HR 11265, has been introduced which would, if enacted, restrict foreign ownership of U.S. corporations with more than $1,000,000 in assets and 500 shareholders to 5% of the voting securities or 35% of the nonvoting securities. The bill would not require divestiture of existing holdings. The bill is in reaction to the recent increase in take-over bids by foreign companies and the "Arab ownership" problem. The chance of enactment seems nil.

2. Rule 144 - Sales under the Rule of Pre-April 15, 1972 Securities do not Prohibit Subsequent Sales Outside the Rule. The SEC has changed its position and now interprets Rule 144 as not precluding subsequent sales outside Rule 144 of pre-April 15, 1972 securities after sales under Rule 144.

3. Deductibility of Stock Issuance Expenses of Mutual Funds. Rev. Rul. 73-463, Nov. 5, 1973 clarifies the deductibility as an ordinary expense of mutual fund stock issuance expenses except those incurred during the initial 90 days when the fund is first offered.

4. Investment Advisers - Fee Splitting. In what appears to be a significant departure from its Argus letter, the Staff of the SEC has indicated that if there is full disclosure of the conflict and the ability of clients to obtain advice from others and written acknowledgement of understanding by the clients, a fee splitting arrangement between a soliciting agent (registered as an adviser) and a bank affiliated adviser may proceed. John C. Tead Co., CCH ¶79,557 (Avail. Nov. 2, 1973).

5. Mutual Fund Post-Effective Amendments. SA Rel. No. 5439 (Nov. 14, 1973) requests that the facing page of PEs set forth whether it is the "narrative only" or "2d part of 5035 filing"; the fund's fiscal year end in the narrative only filing and in the 2d part filing the date the narrative was filed. The release requests that changes be marked and transmittal letters refer to changes not in response to Staff comments.

6. 16(b) - Nonattribution of Transactions by a Public Corporation. Insiders are not liable under 16(b) for "short-swing profits" resulting from sales by a public company of which they are nonmanagement directors and own about 16% of the stock and purchases by the insiders. There is no matching of the company's sales with the insiders' purchases where there is no showing that the company is the alter ego of the insiders. Popkin v. Dingman, CCH ¶94,203 (S.D.N.Y. Sept. 21, 1973).

7. Inside Information Guidelines. The consent decree in the Liggett & Myers case, CCH ¶94,204 provides for the adoption by the company of policy guidelines for handling inside information. In view of the holding in the Lums case and the desire of the SEC for such guidelines, it is suggested that all public companies consider adopting them.

8. Underwritings - Use of Proceeds. Dictum in Gerity v. Cable Funding Corp., CCH ¶94,205 (D. Del. Nov. 6, 1973) indicates that in the absence of proof of misrepresentation, §§ 11 and 12 of the 1933 Act do not override the corporate charter as to use of proceeds. If there is a legitimate change of circumstances the proceeds can be used for any corporate purpose.

9. 10b-5 - Liability of Accountants and Indenture Trustees. Lewis v. Marine Midland Grace Trust Co., CCH ¶94,206 (S.D.N.Y. Nov. 7, 1973) indicates that privity will not be an impediment in proceeding against third parties who "knew or should have known". The opinion is a good review of the elements of a 10b-5 cause of action.

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